lower court rightly decided that it was not bound by the rule applied in the decisions of the highest court of Massachusetts. *Swift* v. *Tyson*, 16 Pet. 1, 18; *Boyce* v. *Tabb*, 18 Wall. 546; *Railroad Company* v. *National Bank*, 102 U. S. 14, 28; *Presidio County* v. *Noel-Young Bond Co.*, 212 U. S. 58, 73; *Methven* v. *Staten Island Light, Heat & Power Co.*, 66 Fed. 113; *In re Leterman, Becher & Co.*, 260 Fed. 543, 547.

The precise question now before us was not involved, and therefore was not decided, in any of the decisions of this Court cited by the Circuit Court of Appeals.

In *Judson* v. *Corcoran*, 17 How. 612, one Williams had a claim against Mexico for the illegal confiscation of a cargo. Under a treaty with Mexico (9 Stat. 922) such claims were to be adjusted by the United States upon allowance by a board of commissioners created by an act of Congress. 9 Stat. 393. Judson obtained from Williams an assignment of an interest in the claim. Later Corcoran obtained assignments covering the whole claim. The board found that Corcoran owned the whole claim and made an award in his favor. Judson set up no pretensions to the claim until after the award, some six years from the time he obtained the assignment. This Court (p. 614) pointed out that the assignor, having parted with his interest by the first assignment, the second assignee could take nothing by the later assignment; that the purchaser is entitled only to the remedies of the seller, and hence has arisen the maxim that "he who is first in time is best in right." The second assignee had drawn to his equity a legal title to the fund (the award of the board of commissioners); and it was said that,—assuming that no negligence could be imputed to the earlier assignee and that the case was one where an equity in the same chose in action was successively assigned to two innocent persons whose equities are equal,—there must be applied the rule that "the equities being equal, the law must prevail."

The court said (p. 615): "There may be cases in which a purchaser, by sustaining the character of a bona fide assignee, will be in a better situation than the person was of whom he bought; as, for instance, where the purchaser, who alone had made inquiry and given notice to the debtor, or to a trustee holding the fund, (as in this instance,) would be preferred over the prior purchaser, who neglected to give notice of his assignment, and warn others not to buy."

Judson took his assignment in 1845 and first produced it in 1851. In the meantime, Corcoran got his assignment, gave notice, and prosecuted it to final award. It was held that he was entitled to the fund. Clearly that case does not hold that mere priority of notice by a later assignee will subordinate the rights of the first purchaser.

In *Spain* v. *Hamilton's Administrator*, 1 Wall. 604, the fund was one-tenth of the amount to be received from the United States on account of bonds of the Republic of Texas, after payment of a debt owed by a bank to one Wetmore, which the bonds were pledged to secure. Wetmore was trustee to make collection. The bank gave Hamilton an order on him for the fund. Hamilton made the following assignments: February 12, 1850, to Spain in general terms, without limit as to amount and not identifying the fund. August 30, 1850, to Wetmore for $2,500. September 21, 1850, to Corcoran & Riggs for $30,000, which was presented to and accepted by Wetmore. April 30, 1851, to Robb, the whole fund, subject to Wetmore's claim and that of Corcoran & Riggs. Robb gave notice immediately and later obtained judgment and made seizure of the residuary fund. Hill succeeded to the rights of Robb. The one-tenth covered by the order of the bank in favor of Hamilton was left in the Treasury, subject to the assignments. May 10, 1856, Spain brought suit, claiming the fund under the document of February 12, 1850. Up to this time, neither Wetmore nor any of

the other assignees had heard of Spain's claim against the fund.

In its decision, this Court referred to Spain's negligence and delay. It adverted to the rule that the assignee is entitled to the remedies of the assignor and is subject to all the equities between him and his debtor, and said: (p. 624) "But in order to perfect his title against the debtor it is indispensable that the assignee should immediately give notice of the assignment to the debtor, for otherwise a priority of right may be obtained by a subsequent assignee, or the debt may be discharged by a payment to the assignee [assignor] before such notice."

If a debtor pays, or becomes bound to pay, a later assignee, he is not liable to an earlier assignee who failed to give him notice of his assignment. And if, without notice of any assignment, he pays the assignor he cannot be held by the assignee. To safeguard against such things, it is necessary for an assignee to give the debtor notice of his assignment. But it does not follow that mere priority of notice of the later assignee, who took nothing by his assignment, will subordinate the rights of an earlier assignee. That case does not establish or apply the rule contended for by respondent.

In *Laclede Bank* v. *Schuler*, 120 U. S. 511, it was held that a bank is not liable to a holder of a check which was not presented for payment until after the drawer had made a general assignment for the benefit of creditors, and directed the bank to hold the fund subject to the order of the assignee. This case does not support the rule applied by the Circuit Court of Appeals. A check in usual form does not constitute an assignment. It is an order which may be countermanded at any time before it is cashed. *Fourth Street Bank* v. *Yardley*, 165 U. S. 634, 643; *Florence Mining Co.* v. *Brown*, 124 U. S. 385, 391.

The doctrine that mere priority of notice to trustee or debtor gives priority of right to a later assignee over an

earlier assignee of a chose in action is generally referred to *Dearle* v. *Hall* and *Loveridge* v. *Cooper*, 3 Russell, 1, decided at the same time and upon the same principle. The leading case is *Dearle* v. *Hall*. In that case, there was much more in favor of the second assignee than mere priority of notice. Brown, *cestui que trust* under his father's will, made three assignments of income payable to him during his life by the executors. The two earlier assignments were made to Dearle and Sherring, respectively. Each was for a part of the annual income. By the terms of the assignments the assignor was permitted to continue to collect, and for years he did collect, the income assigned. No notice of the earlier assignments was given to the executors. Before he purchased, Hall, the latest assignee, diligently inquired of the trustees as to Brown's title and the amount of income paid him. The trustees knew of no assignments, and without any suspicion of prior incumbrance, Hall in good faith purchased the entire claim. He gave immediate notice of his assignment to the trustees and received assurance that the income would be paid to him. When it became due, an installment was paid to him. Thereafter, the earlier assignees gave notice and demanded payment under their respective assignments. The trustees withheld all payments. Suit was brought by Dearle and Sherring against Hall to establish priority of their assignments over his. In the lower court, Sir Thomas Plumer, M. R., gave judgment in favor of Hall, and it was affirmed by Lord Lyndhurst, L. C. Two grounds of the decision may be gathered from the opinions: (1) That the negligence of the prior assignees in failing to give notice to the trustees resulted in Hall being induced to purchase without knowledge of the prior assignments. (2) That notice to the trustees was necessary to perfect title,—as, "the act of giving the trustee notice is in a certain degree taking possession of the fund." (See *Ward* v. *Duncombe*, L. R. A. C. [1893] 369, 387.) These cases

did not decide that notice by a subsequent assignee after his purchase, without any inquiry in advance of his purchase, will subordinate the title of the prior assignor to that of the later. No such questions were involved. But later, in the case of *Foster* v. *Cockerell*, in the House of Lords, 3 Cl. & F. 456, that question was decided in favor of the subsequent assignee, and it appears to have become the settled rule in England. However, it has been the subject of much discussion and explanation by the English courts. See *Wilmot* v. *Pike*, 5 Hare, 14; *Ward* v. *Duncombe*, *supra*. It appears that in 1814 in *Cooper* v. *Fynmore*, 3 Russell, 60, Sir Thomas Plumer, V. C., himself decided that mere neglect of notice was not sufficient to postpone the first assignee, and held (p. 64): "In order to deprive him of his priority, it was necessary that there should be such laches as, in a court of equity, amounted to fraud." In 1827, *Dearle* v. *Hall* and *Loveridge* v. *Cooper* were decided. In 1833, Lord Lyndhurst, then Chief Baron, in *Smith* v. *Smith*, 2 Cr. & M. 231, in the Court of Exchequer, held that the second assignee in order to obtain priority must show that he exercised proper caution in taking the assignment, and that he had applied to the trustees to know if any previous assignment had been made, and that, unless he so applied to each of the trustees, he would not have exercised due caution or done all that he ought to have done. Lord Herschell, in *Ward* v. *Duncombe*, *supra*, said (p. 380): "The language thus used by the Chief Baron is somewhat remarkable. It would seem, if correctly reported, to indicate the view that a second incumbrancer would only obtain priority over an earlier one if he had used due caution, and had, in fact, made such inquiry as a prudent man would of each of the trustees. This view is in direct conflict with the decision of this House two years later in *Foster* v. *Cockerell* in which Lord Lyndhurst himself delivered the leading opinion." Undoubtedly the first application of

the rule that mere priority of notice gives priority of right was in *Foster* v. *Cockerell*, but it is always referred to *Dearle* v. *Hall* and *Loveridge* v. *Cooper*. In *Ward* v. *Duncombe*, the earlier decisions by which the rule was established were discussed by Lord Herschell and Lord Macnaghten. The opinions leave the impression that the rule itself was not deemed to be wholly satisfactory, and that it is not very clear upon what principle it rests. *Ward* v. *Duncombe*, *supra*, 391.

There is no decision of this Court which sustains the contention that, as between successive assignees of the same chose in action, mere priority of notice gives priority of right. It seems to us that the better reasons are against such a rule. By the first assignment, the rights of the assignor pass to the assignee. The creditor has a right to dispose of his own property as he chooses and to require the debt to be paid as he directs, without the assent of the debtor. See Story, Equity Jurisprudence, 11th ed., § 1057. Notice of the assignment to the debtor adds nothing to the right or title transferred. A subsequent assignee takes nothing by his assignment, because the assignor has nothing to give. See *Judson* v. *Corcoran*, *supra*, 614. If, after assignment, the assignor receives payment from the debtor, he is liable to the assignee. Failure of the first assignee to give notice does not divest him of any title or right or vest any claim in a subsequent purchaser. It cannot injuriously affect an intending purchaser who makes no inquiry of the debtor concerning the assignor's title. The debtor is not bound to answer inquiries concerning the assignor's title, and there can be no assurance that an intending purchaser can ascertain the incumbrance by inquiry of the debtor having notice of the earlier assignment. *Low* v. *Bouverie*, (1891) L. R. 3 Ch. 82, 99. Compare *Ward* v. *Duncombe*, *supra*, 393. It is impossible to eliminate all risk from such a transaction. If the second assignee elects to rely on the

representations of the vendor as to his title, and is deceived, he cannot shift his loss to the first assignee, unless some act or omission of the latter was proximate to the deception.

Facts and circumstances may create an equitable estoppel against the first assignee. *Herman* v. *Mutual Life Insurance Co.*, 218 Mass. 181; *Rabinowitz* v. *People's National Bank*, 235 Mass. 102.[6] It would be unconscionable to permit him to prevail over a later assignee whom he had misled or deceived in respect of the assignor's title at the time of purchase by the latter. But, assuming a duty on the first purchaser to protect a subsequent assignee against deception and fraud by the assignor, there is no ground for subordinating his claim, unless his failure was an element in or contributed to the deception. In the absence of inquiry by the subsequent purchaser, the failure of the first to give notice is immaterial.

In a case where, as here, the later assignee has made no inquiry of the debtor in advance of taking his assignment, there is no analogy between the giving of notice by the

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[6] In *Ward* v. *Duncombe*, Lord Macnaghten said (p. 391):

"The general principle applicable to all equitable titles is, I think, well expressed by Lord Cairns in *Shropshire Union Railways and Canal Company* v. *The Queen* (L. R. 7 E. & I. at p. 506): 'A pre-existing equitable title,' said Lord Cairns, 'may be defeated by a supervening legal title obtained by transfer'—he was there speaking of an equitable title to shares. Then he goes on: 'And I agree with what has been contended, that it may also be defeated by conduct, by representations, by misstatements of a character which would operate and enure to forfeit and to take away the pre-existing equitable title. But I conceive it to be clear and undoubted law, and law the enforcement of which is required for the safety of mankind, that in order to take away any pre-existing admitted equitable title, that which is relied upon for such a purpose must be shewn and proved by those upon whom the burden to shew and prove it lies, and that it must amount to something tangible and distinct, something which can have the grave and strong effect to accomplish the purpose for which it is said to have been produced.'"

first assignee to the debtor and the taking of possession of tangible personal property by a purchaser. It is impossible in any real sense to transfer possession of accounts receivable or the like, and, as to them, an assignee does not become clothed with the *indicia* of ownership as does one taking possession of tangible things. It is not accurate to say that notice is necessary to perfect title in the assignee of a chose in action. While failure to give notice may become an important element in a situation from which equitable estoppel may arise against the first assignee, it cannot be said to be necessary to or an element in acquisition of title.

The result will be the same if it be assumed that each *bona fide* purchaser takes merely an equity in the chose in action assigned. If equities are equal, the first in time is best in right. Otherwise the stronger equity will prevail. While there are contingencies which entitle the second to prevail over the first assignee,[7] we hold that mere priority of notice to the debtor by a second assignee, who lent his money to the assignor without making any inquiry of the

[7] In Professor James Barr Ames' Cases on Trusts, 2nd ed., in a note on *Dearle* v. *Hall*, it is said (p. 328): "Whatever view may be entertained as to the English doctrine which prefers the assignee who first gives notice, the second assignee is in several contingencies clearly entitled to supplant the first assignee. E. g. (1) If, acting in good faith, he obtains payment of the claim assigned; *Judson* v. *Corcoran*, 17 How. 612; *Bridge* v. *Conn. Company*, 152 Mass. 343; *Bentley* v. *Root*, 5 Paige 632, 640; or (2) if he reduces his claim to a judgment in his own name; *Judson* v. *Corcoran*, 17 How. 612; *Mercantile Company* v. *Corcoran*, 1 Gray 75; or (3) if he effects a novation with the obligor, whereby the obligation in favor of the assignor is superseded by a new one running to himself, *N. Y. Company* v. *Schuyler*, 34 N. Y. 30, 80; *Strange* v. *Houston Company*, 53 Tex. 162; or (4) if he obtains the document, containing the obligation, when the latter is in the form of a specialty. *Re Gillespie*, 15 Fed. 734; *Bridge* v. *Conn. Company*, 152 Mass. 343; *Fisher* v. *Knox*, 13 Pa. 622. In all these cases, having obtained a legal right in good faith and for value, the prior assignee cannot properly deprive him of this legal right."

debtor, is not sufficient to subordinate the first assignment to the second. The petitioner is entitled to the fund.

Decree reversed.

MR. JUSTICE HOLMES and MR. JUSTICE BRANDEIS concur on the ground that the rights of the parties are governed by the law of Massachusetts.